Supreme Court, U.S.
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JOSEPH F. SPANIOL, JR.
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No. 85-6461

In the Supreme Court of the United States

OCTOBER TERM, 1985

EARLINE MARTIN, PETITIONER

v.

STATE OF OHIO, RESPONDENT

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

JOINT APPENDIX

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PETITION FOR CERTIORARI FILED MARCH 4, 1986
CERTIORARI GRANTED APRIL 21, 1986

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RELEVANT DOCKET ENTRIES

DATE	PROCEEDINGS
	CUYAHOGA COUNTY COURT OF COMMON PLEAS
August, 1983	Indictment Filed
August 8, 1983	Defendant Arraigned, Enters Not Guilty Plea
December 16, 1984	Defendant Found Guilty By Jury, Sentenced To Life For Murder, Plus 3 Years Consecutive For Gun Specification
January 16, 1984	Notice Of Appeal Filed
	IN THE OHIO COURT OF APPEALS
January 17, 1984	Appeal Docketed
November 21, 1984	Announcement Of Court's Decision (Affirming Conviction) Filed
December 3, 1984	Journal Entry And Opinion, Affirming Conviction, Filed
	IN THE SUPREME COURT OF OHIO
January 28, 1985	Notice Of Appeal (to Ohio Supreme Court) Filed
February 25, 1985	Memorandum In Support Of Jurisdiction Filed
March 15, 1985	Memorandum Opposing Jurisdiction Filed By State
April 17, 1985	Motion For Leave To Appeal Allowed
April 17, 1985	Order To Certify Record Sent To Ohio Court Of Appeals And Cause Docketed On Its Merits
January 15, 1986	Opinion Affirming Conviction Filed

CUYAHOGA COUNTY COMMON PLEAS

THE TERM OF MAY OF 1983

Case No. CR 184334

THE STATE OF OHIO

vs.

EARLINE K. MARTIN

Date of Offense July 21, 1983

A TRUE BILL INDICTMENT FOR AGGRAVATED MURDER R.C. 2903.02 WITH GUN SPECIFICATION

THE STATE OF OHIO,)
) ss.
CUYAHOGA COUNTY)

The Jurors of the Grand Jury of the State of Ohio, within and for the body of the County aforesaid, on their oaths, IN THE NAME AND BY THE AUTHORITY OF THE STATE OF OHIO, Do find and present, that the above named Defendant(s), on or about the date of the offense set forth above, in the County of Cuyahoga, unlawfully and purposely and with prior calculation and design, caused the death of another, to-wit: Walter Martin.

SPECIFICATION ONE: (gun)

The Grand Jurors further find and specify that the offender Earline K. Martin had a firearm on or about her person or under her control while committing the offense charged in this count of the indictment.

contrary to the form of the statute in such case made and provided, and against the peace and dignity of the State of Ohio.

/s/ [Illegibile]
Prosecuting Attorney

Foreman of the Grand Jury

COURT OF COMMON PLEAS,
CUYAHOGA COUNTY, OHIO

No. CR-184334

OHIO, PLAINTIFF

v.

EARLINE MARTIN, DEFENDANT

JURY CHARGE

[673]

THE COURT: Ladies and gentlemen of the jury. At this time you have heard the evidence and arguments of counsel. It now becomes my duty to instruct you on the law to apply to this case. The Court and jury have separate functions, you decide the disputed facts and the Court provides the instructions of law.

It is your sworn duty to accept these instructions and apply the law as it is given to you. That is, you are to apply it as your guide throughout your entire deliberations and apply it to the facts, as you find the facts to be, and then render your judgment accordingly. This you are required to do, independent and apart from any notion or opinion of any kind or nature which you may have ever possessed as to what the law is or what the law ought to be, given the facts in the particular case. Therefore, you are not permitted to change the law, nor to apply your own ideas of what you think the law ought to be.

It also follows that, in strict keeping with your oath, you refuse absolutely to be moved, swayed or influenced by considerations such as sympathy for or bias or prej-

udice against either [674] the State of Ohio or the Defendant, Earline Martin.

A criminal case begins with the filing of the indictment by the Grand Jury. This indictment informs the Defendant that he has been charged with a crime. It may not be considered for any other purpose. The plea of not guilty is a denial of the charge and puts in issue the essential elements of the crime or crimes charged in the indictment. At the very outset, the jury will understand that the mere fact the Defendant has been charged by the Grand Jury of this county raises no presumption of the guilt of the Defendant. The Grand Jury is a one-sided procedure. The indictment itself is simply the means created by law for presenting, in a formal way, a criminal charge and again, you will not consider the fact that it has been made as in any way or manner constituting evidence or guilt of the Defendant.

At the very commencement of this trial, counsel for the State and the defense addressed the jurors in what we formally refer to as "opening statements." In such opening statements both counsel sought to present an outline of what they believed the testimony of the evidence [675] would disclose as the trial progressed. When presentation of all the evidence was completed, counsel for the State and for the Defendant addressed the jury in what we have referred to as "closing arguments," and in those closing arguments they set forth and developed theories and conclusions which they believed may reasonably be drawn from all the evidence in this case.

Such opening statements and closing arguments are permitted in an effort to assist the jury, if possible, in understanding and reaching the conclusions as to the issue which the jury is called upon to decide. You are instructed that such opening statements and closing arguments do not constitute evidence in this case, and will not be considered as evidence by the jury.

The evidence, as I have said, does not include the Grand Jury indictment, the opening statements or closing

arguments of counsel, and further, does not include any answers to questions that I have instructed you to disregard.

You must not speculate as to why the Court sustained an objection to any question or what the answer to such question might have been. [676] You must not draw any inferences or speculate on the truth of any suggestions included in the question that was not answered.

As I previously indicated to you, a criminal case begins with the filing of the indictment by the Grand Jury. To the indictment, as returned by the Grand Jury, and as read to you, the Defendant has entered a plea of not guilty. By such plea, the Defendant denies the existence of each and every element and circumstance which, as a matter of law, goes to make up and constitutes a crime or offense charged in the indictment and any lesser included offense that you may consider.

The plea of not guilty as so tendered by the Defendant, has, as a matter of law, the effect of placing upon the shoulders of the State of Ohio the burden of proving beyond a reasonable doubt the existence of each and every material allegation and averment of the indictment.

The plea of not guilty entered by the Defendant, as a matter of law, has a further effect; such plea clothes the Defendant with the legal presumption of innocence. This presumption of innocence is not a mere matter of form, but [677] rather is a shield which the law throws about the Defendant.

This presumption of innocence is afforded the Defendant as he enters upon the trial and remains with the Defendant throughout the entire trial and during the examination into every fact and proposition to be proven by evidence by the State. This presumption of innocence is only overcome or overthrown when you, as a jury, find the proof is such as to exclude every reasonable doubt of the guilt of the Defendant.

Ohio Revised Code Section 2901.05, effective January 1st, 1974, provides:

"Every person accused of an offense is presumed innocent until proved guilty beyond a reasonable doubt and the burden of proof is upon the prosecution."

What is reasonable doubt? Reasonable doubt is present when the jurors, after they have carefully considered and compared all the evidence, cannot say they are firmly convinced of the truth of the charge. It is a doubt based on reason and common sense. Reasonable doubt is not a mere possible doubt because everything [678] relating to human affairs and depending on moral evidence is open to some possible or imaginary doubt. Proof beyond a reasonable doubt is proof of such character that an ordinary person would be willing to rely and act upon it in the most important of his own affairs.

This is a statutory definition, by the way, which we are required to read in every criminal case in the State of Ohio. You have been told through the course of this trial that you're to decide this case based upon the evidence.

What is evidence? Whenever reference is made to evidence upon which this case is to be decided, the jury will understand that we mean evidence, that is testimony from the witnesses, the exhibits admitted during trial, and any facts agreed to by counsel.

There were certain agreements known as stipulations. These stipulations were reached between the State and the Defendant and are to be accepted by you as facts. No further evidence need be brought in on this point. This is, likewise, applicable to anything the Court took judicial notice of. I believe in this case the only thing that was noted, that I took judicial [679] notice, was the fact that the board up here is not going with you to the juryroom, which was a rough schematic of the alleged crime scene.

Evidence, ladies and gentlemen of the jury, may be either direct or circumstantial or a combination of both. Direct evidence is testimony given by a witness who has seen or heard the facts to which he has testified. It includes the exhibits accepted as evidence during the trial and any stipulations. If a witness testified from personal

knowledge to the commission of an act to be proven or in order to establish a defense, this is called "direct, positive" or "eyewitness" evidence.

It is not always possible to ascertain the truth by evidence of this direct character; hence the law permits the introduction and consideration of what is called "circumstantial evidence." By circumstantial evidence is meant proof of certain facts and circumstances from which the jury may infer other connected facts which usually and reasonably follow according to the common experience of mankind, and which connected facts tend to show the guilt or innocence of the person charged with the [680] commission of a crime.

It is either by a process of reasoning, or as a result of common experience, you may conclude that when certain facts exist, certain other facts usually coordinate therewith. A conclusion so deduced or drawn from a proven fact or facts is what we refer to as an "inference."

In considering the evidence in this case, either direct or circumstantial, you may draw inferences from proven facts. You are instructed, however, that you are not permitted to base one inference upon another inference. Each inference must be predicated or based upon a proven fact or facts. Two or more inferences may be drawn from the same proven facts or additional facts in evidence, or circumstances in evidence.

In this case we have a combination of both direct and circumstantial evidence. In the absence of direct evidence circumstantial evidence by itself would justify the finding of guilt. If the circumstances are entirely consistent with the Defendant's guilt and are wholly inconsistent with any reasonable theory of the Defendant's innocence, and are so convincing as [681] to eliminate reasonable doubt of the Defendant's guilt, then you must find the Defendant guilty.

If the circumstances create inferences that are equally consistent with guilt or innocence, such inferences must be resolved in favor of the Defendant.

You, the jury, are the sole judges of the facts of the credibility of the witnesses and the weight to be given to the testimony of each witness. To weigh the evidence, you must consider the credibility or believability of each person testifying. You will apply the test of truthfulness which you apply in your daily lives.

You will recall the instructions I gave you at the commencement of the trial as relates to assessing the credibility of the witnesses. That would likewise include the Defendant, Earline Martin, in this case.

In determining the credibility of the witnesses, you should consider the interest or bias the witness has in the outcome of the verdict; his appearance, manner and demeanor while testifying before you; his candor and frankness; or lack of candor or frankness; the consistency of [682] his testimony with other known facts in the case; his accuracy of memory or inaccuracy of memory; his intelligence, or lack of intelligence; the reasonableness or unreasonableness of his testimony; the opportunity the witness had to see or hear or know the truth of the facts and circumstances concerning the things which he has testified; and any or all other facts and circumstances surrounding the testimony which, in your judgment, would add or detract from the credibility and weight of his or her testimony.

Applying these tests, you will assign to the testimony of each witness such weight as you determine proper. You are instructed that you are not bound to believe something to be a fact simply because it is testified to by a witness.

If you believe from all the evidence that such witness was mistaken or has testified untruthfully of such a fact, you are not required to believe the testimony simply because he or she was under oath. You may believe or disbelieve all or any part of the testimony of any witness.

It is within your province as a juror to determine what testimony is worthy of belief [683] in the exercise of your honest and impartial judgment and what testi-

mony is not worthy of belief. As a matter of law, you may believe a portion of the testimony of a particular witness and disbelieve the rest of his testimony. You may believe all of the testimony of a particular witness or you may disbelieve all of the testimony of a particular witness.

You are instructed that one way of impeaching a witness is by showing that the witness has made different and contradictory statements on the same point on a former occasion. If you find from the evidence that any witness has been impeached in this manner, you may take that into consideration in determining his credibility and the weight of his testimony.

Police officers have testified in this case. I say to you, that as a matter of law, you will give no greater or lesser consideration to their testimony merely because they are police officers; but you will apply the same rules for testing credibility concerning the weight to be given to their testimony as you would to any other witness.

One who follows a profession such as [684] a doctor and coroner, or one who follows certain other professions or line of work which, after years of practice, is supposed to make them skillful in their line of work, may express his or her opinion because of his or her education, knowledge or experience.

In this case we have received testimony from such witnesses which we sometimes classify and title "expert witnesses." This would include Dr. Challener, Sharon Rosenberg, Detective Pollutro and Sergeant Patrick Reynolds.

In addition to stating facts and findings, the so-called "expert witness" is permitted to state his or her opinion, based upon certain findings or alleged findings which he or she claims were made. Such testimony is admitted for whatever assistance it may provide in helping you to arrive at a just verdict. As with other witnesses, you alone have the duty of deciding what weight should be given to the testimony of such expert witnesses.

In determining its weight, you may take into consideration their skill, experience, knowledge, veracity, familiarity with the facts of the case, and the usual rules for testing [685] credibility in determining the weight to be given the testimony of the expert.

The mere fact that this witness may be following a vocation as a doctor or coroner or officer of a scientific unit does not warrant the jury in giving more, or for that matter, less credence to their testimony, but you should apply the same test to this testimony that you apply to the testimony of other witnesses in light of all the evidence and decide such weight or credence that you will give to such direct and opinion testimony. You are instructed, however, that such testimony is not to supplant, but rather to supplement your judgment.

There was evidence and testimony admitted as to statements and declarations allegedly made by the Defendant, Earline Martin. You should consider with caution testimony as to oral or written statements or declarations made by the Defendant. In weighing such evidence, you should consider whether the statements or declarations were made by the Defendant; whether it was truthful; whether it accurately reported; whether the witness testifying to such statements or declarations fully heard and understood what [686] was said. You should consider the circumstances under which it was made; the emotions that may have existed at the time; and the difficulty of contradicting any such statement.

However, upon you alone rests the duty of applying the general rules of testing the credibility of witnesses and deciding what weight should be given to any or to all or any part of such evidence.

By law, I have to read to you—I'm going to submit to you a copy of the written instructions. I want to also apologize for the manner in which it is written. It made reference to his as opposed to hers. Please give me that much leeway.

The Defendant, Earline K. Martin, is charged with aggravated murder. Before you can find the Defendant guilty of aggravated murder, you must find beyond a reasonable doubt that on or about the 21st day of July, 1983, and in Cuyahoga County, Ohio, the Defendant unlawfully and purposely and with prior calculation and design, caused the death of another, to-wit: Walter Martin.

Before you can find the Defendant [687] guilty, you must find beyond a reasonable doubt:

1. That Walter Martin was a living person and that his death was caused by the Defendant in Cuyahoga County, Ohio, on or about the 21st day of July, 1983.

2. That the killing was done purposely and with specific intent; and

3. That the Defendant acted with prior calculation and design.

I used the term "purpose." This, by the way, is going to be applicable to both aggravated murder and the lesser included offense of murder. It is not applicable to the lesser included offense of voluntary manslaughter. I will explain that to you in a moment.

Purpose. Purpose to kill is an essential element of the crime of aggravated murder.

A person acts purposely when it is his or her specific intention to cause a certain result. It must be established in this case that at the time in question there was present in the mind of the Defendant a specific intention to kill Walter Martin.

Purpose is a decision of the mind to [688] do an act with a conscious objective of producing a specific result. To do an act purposely is to do it intentionally and not accidentally. Purpose and intent mean the same thing. The purpose with which a person does an act is known only to himself, unless he expresses it to others or indicates it by his conduct.

The purpose with which a person brings about a result is determined from the manner in which it is done, the

weapon used and all the other facts and circumstances in evidence.

None of these factors, in and of themselves, are conclusive as to the Defendant's intent. But they may be considered together with all of the other evidence, whether such evidence was introduced by the prosecution to indicate the Defendant's intent or by the Defendant to indicate her lack of intent, in determining whether the Defendant specifically intended to cause the death of Walter Martin.

What then does "specific intent" mean? No person shall be convicted of aggravated murder unless she is specifically found to have intended to cause the death of another. Specific intent in Ohio is no more or less than a particular [689] intent prescribed by statute. This statute mandates that the jury must find that the killing was done purposely and with specific intent, and that the Defendant specifically intended to produce the death of Walter Martin.

If, ladies and gentlemen, a wound is inflicted upon a person with a deadly weapon in a manner calculated to destroy life, the purpose to kill may be inferred from the use of the weapon. Such inference is not conclusive, but may be accepted or rejected by you in your deliberations. If you accept such inference, then you must consider it together with the sum totality of all of the evidence, facts, and circumstances bearing upon the issue of intent.

"Cause" is an essential element of the offenses that you will consider, aggravated murder, murder and voluntary manslaughter. The State charges that the act of the Defendant caused the death of Walter Martin. Cause is an act which in a natural and continuous sequence directly produces the death of a person and without which it would not have occurred. Cause occurs when the death is a natural and foreseeable result of the act of the Defendant.

[690] Purpose is also an essential element of both aggravated murder and murder.

Purpose is a decision of the mind to do an act with a conscious objective of producing a specific result. To do an act purposely is to do it intentionally and not accidentally. Purpose and intent mean the same thing.

What do we mean by "prior calculation and design?"

Prior calculation and design means the purpose to kill was reached by the Defendant through a definite process of reasoning in advance of the killing, which process of reasoning must have included a mental plan, involving studied consideration of the method and the means with which to kill another, or the instrument or weapon used to kill another.

No definite period of time must elapse and no particular amount of consideration must be given to the prior calculation and design to kill.

Acting on the spur of the moment or after momentary consideration of the purpose to kill is not sufficient to constitute the kind of prior calculation and design required for [691] aggravated murder.

In determining the element of prior calculation and design, if you find that the State has proved beyond a reasonable doubt that the Defendant actually formed a purpose to kill and that her purpose was arrived at with prior calculation and design before she performed the act, that is sufficient for this element of aggravated murder.

This is in the indictment and I will explain this to you, or the verdict form, which indicates a gun specification.

Before you can make a finding as to the specification, you must find beyond a reasonable doubt that on or about the 21st day of July, 1983, and in Cuyahoga County, Ohio, the Defendant had a firearm on or about her person or under her control while committing the offense charged.

I will now define the word "firearm" under Revised Code 2923.11(B):

"Firearm means any deadly weapon capable of expelling or propelling one or more projectiles by the action of an explosive or a combustible propellant. Firearm includes any [692] unloaded firearm and any firearm which is inoperable but which can readily be rendered operable."

What does "deadly weapon" mean?

A deadly weapon is any instrument, device or thing capable of inflicting death and designed or specifically adapted for use as a weapon or possessed, carried or used as such weapon.

A deadly weapon is an object or instrument which is capable of inflicting death. In determining whether the gun was used as a deadly weapon, you will consider its nature and its capability of being used to inflict death, and the manner in which you find it was used in this case.

The definition just read to you relative to a firearm and deadly weapon is applicable in a gun specification case and the verdict form as to this will be self-explanatory. There will be a gun specification attached to each of the crimes that you will be considering in this particular case.

If you find, ladies and gentlemen, that the State proved beyond a reasonable doubt [693] all essential elements of aggravated murder, your verdict must be guilty of that offense and in that event, you will not consider any lesser offense.

If you find that the State failed to prove that the offense was done with prior calculation and design, but that the offense was nonetheless purposely caused, you will proceed with your deliberations and decide whether the State has proved beyond a reasonable doubt the elements of the lesser offense of murder.

The offense of murder is distinguished from aggravated murder by the State's failure to prove that the offense was caused with prior calculation and design. To constitute murder as a lesser included offense of aggravated murder, it must be established that on or about the 21st day of July, 1983, in Cuyahoga County, Ohio, the Defendant purposely caused the death of Walter Martin. Purpose and causation have previously been defined for you.

If you find that the State proved beyond a reasonable doubt all essential elements of the lesser crime of murder, your verdict must be guilty of murder and in that event, you will [694] not consider any lesser offense.

If you find that the State failed to prove any of the essential elements of the offense of murder, you must find the Defendant not guilty of murder and you will proceed with your deliberation and decide whether the State has proved beyond a reasonable doubt the essential elements of the lesser offense of voluntary manslaughter.

Voluntary manslaughter is knowingly causing the death of another while under the influence of sudden passion or in a sudden fit of rage, either of which was brought on by serious provocation sufficient to incite one into using deadly force.

Now, ladies and gentlemen, you may consider from all of the evidence produced by either the State or the Defense, whether or not mitigating circumstances exist in this incident. Mitigating circumstances that you may consider are "sudden passion," or "sudden fit of rage." Sudden passion or sudden fit of rage can only arise as the result of serious provocation or brought on by the victim, and which is reasonably sufficient to incite the Defendant into using [695] deadly force. The sudden passion or fit of rage must be extreme, that is it must be great in nature and intensity and must exist at the time of the act or acts that caused the death of Walter Martin. Sudden passion or fit of rage must be brought on by serious provocation.

Provocation to be serious must be reasonably sufficient to bring on sudden passion or fit of rage. The provocation must be reasonably sufficient to incite or to arouse the Defendant into using deadly force. In determining whether the provocation was reasonably sufficient to incite the Defendant into using deadly force, you must consider the emotional and mental state of this Defendant and the conditions and circumstances that surrounded her at that time.

Deadly force means any force which carries a substantial risk that it will proximately result in the death of any person.

In determining whether the Defendant was under the influence of sudden passion or in a sudden fit of rage, either of which was brought on by serious provocation occasioned by the victim, you should consider any creditable evidence whether offered by the State or the [696] Defense; that is, sudden passion or a sudden fit of rage is not an element of the offense, but it is a factual circumstance mitigating the culpable mental state of the Defendant and neither the State nor the Defense, has the burden of proof on this issue.

If you find that mitigating circumstances are present in this incident, you will then consider the lesser but included offense of voluntary manslaughter.

Voluntary manslaughter is knowingly causing the death of another.

You will recall that I defined for you, as relates to aggravated murder, purpose and prior calculation and design and specific intent. In any crime in the State of Ohio it has to be proved that the Defendant charged has a certain mens rea or culpable mental state. A culpable mental state, generally speaking, as related to aggravated murder, is what is called purpose or purposely. Culpable mental state is called knowingly, which I shall define for you. A person acts knowingly, regardless of his purpose, when she is aware that her conduct will probably cause a

certain result. A person has knowledge [697] of circumstances when she is aware that such circumstances probably exist.

Since you cannot look into the mind of another, knowledge is determined from all the facts and circumstances in evidence. You will determine from these facts and circumstances whether there existed at the time in the mind of the Defendant an awareness of the probability that the incident would occur.

Cause is an essential element of voluntary manslaughter. Cause is an act or failure to act which in the natural and continuous sequence directly produced the death of Walter Martin, and without which it would not have occurred. Cause occurs when the death is the natural and foreseeable result of the act.

A death is the result of an act or failure to act when it is produced directly by the act or failure to act in a natural and continuous sequence and would not have occurred without the act. "Result" occurs when the death is naturally and foreseeably caused by the act.

If you find that the State has proved beyond a reasonable doubt all the essential elements of voluntary manslaughter, to-wit: [698] Knowingly causing the death of another, you will find the Defendant guilty of voluntary manslaughter.

On the other hand, of course, if you find the State failed to prove its case beyond a reasonable doubt as to any one of the essential elements that I have instructed you on, you will find the Defendant not guilty.

Now, ladies and gentlemen of the jury, you have received instructions on aggravated murder, murder and voluntary manslaughter. It is your duty to first consider the charge of aggravated murder. If you find beyond a reasonable doubt that the State of Ohio proved the elements of aggravated murder, you may not go on to consider any of the lesser included offenses defined for you. If you find the Defendant not guilty of aggravated murder, or if you are unable, after a good faith effort, to

reach a verdict as to the crime charged, then and only then may you consider the lesser offense of murder. The same instruction is applicable should you go on to consider voluntary manslaughter.

Basically speaking, look at the aggravated murder first. If you find the Defendant not guilty, then you go to murder. [699] In the event that you deliberate as to murder, and making a good faith effort, you are unable to reach a verdict, then you go to the next step, the same thing, going on to voluntary manslaughter.

You have been instructed that you are the triers of the facts. You and you alone resolve the factual issues before you. Lesser included offenses are defined not to encourage compromise verdicts, but rather to define the applicable law dependent upon how you resolve the disputed facts.

The Defendant in this case has claimed the affirmative defense of self-defense, which I am about to define for you. As I have indicated to you, there are certain requirements as to elements of the crime that you may consider during the course of your deliberations. The burden of proof is upon the State to prove its case beyond a reasonable doubt. As required in the affirmative defense of self-defense, the burden of proof is upon the Defendant to prove self-defense by what we call a preponderance of the evidence. And I will define self-defense and likewise what a preponderance means.

The Defendant claims that what she did [700] was justified on the basis of self-defense.

To establish self-defense, the following elements must be shown:

The Defendant was not at fault in creating the situation giving rise to the argument; (2) the Defendant had an honest belief that she was in imminent danger of death or great bodily harm and that her only means of escape from such danger was in the use of such force; and (3) the Defendant must not have violated any duty to retreat or avoid the danger.

If the Defendant had reasonable grounds and an honest belief that she was in imminent danger of death or great bodily harm and that the only means of escape from such danger was by killing her assailant, then she was justified even though she was mistaken as to the existence of such danger.

Resort to the use of a deadly weapon is not permitted because of words. Vile or abusive language, or verbal threats, no matter how provocative, do not justify an assault or the use of a deadly weapon.

In determining whether the Defendant [701] had reasonable grounds for an honest belief that she was in imminent danger, you must put yourselves in the position of this Defendant, with her characteristics, her knowledge or lack of knowledge, and under the circumstances and conditions surrounded her at the time. You must consider the conduct of Walter Martin and determine if his acts or words caused the Defendant to reasonably and honestly believe that she was about to be killed or to receive great bodily harm.

Ladies and gentlemen, the law does not measure nicely the degree of force which may be used to repel an assault. However, if a person who is assaulted uses more force than reasonably appears to be necessary under the circumstances and if the force used so grossly disproportionate to her apparent danger as to show revenge or an evil purpose to injure her assailant, then the defense of self-defense is not available.

The Defendant must establish that the other party was the aggressor and that the Defendant did not herself provoke and cause the injury. The defense of self-defense is not [702] available to the person who starts a fight unless, in good faith, she withdraws from the contest and informs the other party of her withdrawal, or by words or acts reasonably indicates that she has withdrawn and is no longer participating in the fight.

The Defendant is not in the position to claim self-defense if she sought trouble and armed with a dangerous

weapon she provoked a fight that had broken off and did not attempt to avoid it or leave the scene of the trouble. Self-defense ceases under the circumstances, and I have already told you about some of them.

If, in the careful and proper use of her faculties, the Defendant honestly believed and had reasonable grounds to believe that an assailant was not able and did not intend to kill or do great bodily harm to the Defendant, then the Defendant having notice of her adversary's position was released from the danger, and the right to use force in self-defense ended. If thereafter the Defendant continued to fight, she becomes the aggressor and subsequent injury is unlawful.

The Defendant is not in a position to [703] claim self-defense if she sought trouble and she provoked a fight and did not attempt to avoid it or leave the scene of the trouble.

I have indicated to you that the burden of proof as relates to the elements that makeup self-defense is upon the Defendant, Earline Martin. The degree of proof is what we call by the proponderance of the evidence.

Preponderance of the evidence is the greater weight of the evidence; that is, evidence that you believe because it outweighs or over-balances in your minds the evidence opposed to it. A preponderance means evidence that is more probable, more persuasive, or of greater probative value. It is the quality of the evidence that must be weighed. Quality may or may not be identical with quantity or the greater number of witnesses. Consider all the evidence.

In determining whether or not an affirmative defense has been proved by a preponderance of the evidence, you should consider all the evidence bearing upon that affirmative defense regardless of who produced it.

If the weight of the evidence is equally balanced or if you are unable to determine [704] which side of the affirmative defense has the preponderance, than the Defendant has not established such affirmative defense.

As I told you before and I will tell you again, you may not discuss or consider the possibility of punishment. Your duty is confined to a determination of the guilt or innocence of the Defendant.

You must not be influenced by any consideration of sympathy or prejudice. It is your duty to carefully weigh the evidence, to decide all disputed questions of fact, to apply the instructions of the Court to your findings, and to render your verdict accordingly. In fulfilling your duty, your efforts must be to arrive at a just verdict.

Consider all the evidence and make your finding with intelligence and impartiality, and without bias, sympathy or prejudice, so that the State of Ohio and the Defendant will feel their case was fairly and impartially tried.

If, during the course of the trial, the Court said or did anything which you consider an indication of the Court's view of the facts, you are instructed to disregard it. This Court [705] will not invade the province of the jury as judges of the facts. I likewise ask you to give me the courtesy of not invading my area, which is relative to the law.

Your initial conduct upon entering the juryroom is a matter of importance. It is not wise to immediately express a determination or to insist upon a certain verdict because if your sense of pride is aroused, you may hesitate to change your position even if you decide you are wrong.

Consult with one another, consider each other's views, and deliberate with the objective of reaching an agreement, if you can do so without disturbing your individual judgment.

Each of you must decide this case for yourself, but you should do so only after a discussion and consideration of the case with your fellow jurors. Do not hesitate to change an opinion if you are convinced that it is wrong. However, you should not surrender honest convictions in order to be congenial or to reach a verdict solely because of the opinion of other jurors.

Will the attorneys please approach [706] the bench?

(Thereupon, discussion was had between Court and counsel outside the hearing of the jury and off the record.)

THE COURT: Other than that mentioned at side-bar, is there anything else on behalf of the Defendant relative to this case?

MISS GAUGHAN: Nothing further on behalf of the State of Ohio.

MR. WILLIS: No, your Honor.

THE COURT: Before reviewing the verdict forms, I will ask all 12 members of the panel: Are you physically able to proceed to the deliberation in this case? You all have said yes. All 12 members have been here and are available are healthy and prepared to in fact deliberate this case. As a result, I am going to excuse Mrs. Ehlert and Mr. Bowen. I want to thank you for your services and your availability here. You will not participate in the deliberations of the jury. You are not to discuss this case or to tell anyone how you would have voted in this particular case.

Please recall the Court's admonition. Don't talk to anyone about this particular matter.

[707] (Thereupon the alternate jurors left the courtroom.)

THE COURT: I am going to give you a copy of that which I just read to you ladies and gentlemen. There are entries in here that refer to his as opposed to her. Please excuse me for that.

I am also going to ask the attorneys to examine all of the exhibits. You will receive all of the exhibits that you're entitled to receive, that were admitted into evidence. They may not be in chronological order, but believe me, they go from 1 through 11, or whatever. You will have all of them. If there were some that were not received and you may say, "Can we have that," that's

not an exhibit in the case. That was for a schematic purpose, to give you an idea of the alleged crime scene.

I will read to you the verdict forms, which you will find self-explanatory. Do not draw any inferences from the order in which I read here. They read as follows:

"State of Ohio, Plaintiff, versus Earline K. Martin, Defendant. Verdict. We the jury in this case being duly empaneled and [708] sworn, do find the Defendant, Earline K. Martin, —" then you have a blank space with an asterisk and we refer to the middle section of the verdict form. You will insert in ink, depending upon your finding, of course, the term "guilty," or "not guilty of aggravated murder of Walter Martin, a violation of RC 2903.01 as charged in the indictment."

Likewise, on each verdict form there is a further finding requested of the jury:

"We further find that the Defendant, Earline K. Martin, —" and you will find a double asterisk before a blank. You will insert in the blank space "did," or "did not have a firearm on or about her person or under her control."

In the event that you find the Defendant guilty of aggravated murder, you may waive your finding relative to the gun specification.

Further, as relates to these other two verdict forms: In the event, as I have indicated to you, you make your finding of not guilty as relates to aggravated murder, don't bother on this form with the gun specification finding; or in the alternative, if you have deliberated this case and maybe fail relative to [709] making a decision. one or the other on this matter, then you will then go to the next lesser included offense on the next form, which reads exactly the same, but it says, "murder," instead of aggravated murder.

You will insert the appropriate finding of guilty or not guilty and did or did not have a firearm.

The last verdict form should be identical to these verdict forms except for the offense which is voluntary

manslaughter. And likewise, you will insert your finding of guilty or not guilty and did or did not have a firearm. You will then sign the bottom portion of the verdict form.

When all 12 jurors agree on a verdict, complete the form which corresponds with your decision, all 12 jurors must sign the verdict in ink. The foreman or forelady will sign the jury form on the first line in ink. Then the other 11 of you people will sign in the remaining lines, when all of you have made a decision in this particular case.

After you retire to the juryroom, first select a foreman or forelady. The purpose [710] of the foreman or forelady is not to have more authority than anyone else. The foreman or forelady will see that your discussions are orderly and that each of you will have an opportunity to discuss your viewpoint of the case and the evidence as it was presented to you throughout the course of this particular trial. If during your deliberations there is a time you have a real problem, that is, if you wish to contact the Court, there is a buzzer on the wall that is available to call the bailiff to the juryroom.

There will be a pad and pen provided for you. If you desire to address any communication of any kind in reference to this case, you will reduce such communication to writing, signed by your foreman or forelady and then we will try to answer your questions.

When you have reached a verdict, the same instructions are applicable. Push the buzzer and it will let us know to come and get you. We will take care of your needs to any extent that we possibly can. I am going to have you deliberate for a period of time this evening. There is no way that anyone can tell how long a [711] jury is going to take to make a decision in any case.

Will the attorneys take a look at the verdict forms and would you like to examine the exhibits, please, when the jury is taken out of the room.

You will note, I have shown these to the representatives of the State and the Defendant, of course. Then I'm going to give it to you. They have some spelling errors in it. I have made an effort to correct them. Please bear with me as it relates to that. If you have any specific questions concerning this charge, again, put it in writing and we will take care of it.

Ladies and gentlemen, this case is now in your hands. Every time you're going to leave your room, whether only for a cup of coffee or whatever, recall the Court's admonition, you don't talk to anyone about the case until all 12 of you are together, seated in the room and deliberating this case. Thank you very much.

(Thereupon, at 4:10 p.m. the jury retired to deliberate.)

[712] (Thereupon, the following proceedings were had outside the presence of the jury and on the record as follows:)

THE COURT: Let the record show that prior to, but at the appropriate time, the Court did ask the parties to approach the side-bar to see if there was anything by way of additions or deletions concerning the charge. We did have a discussion concerning the charge.

I think, already on the record, prior, they have been given an opportunity and have received the charge prior to the final arguments. Specifically, Mr. Willis, do you want to put any specific objection that you have on the record?

MR. WILLIS: With reference to the Court's charge, I would except to the way in which the aggravated murder and murder charges were submitted. The Court indicated to the jury that they had to consider aggravated murder first. If they reached a conclusion that the Defendant was guilty of aggravated murder, they shouldn't go any further. They should return that verdict.

THE COURT: Relative to that charge—

MR. WILLIS: Especially in light [713] of the fact that the jury might take that to mean they don't even

have to consider whether or not the Defendant acted in self-defense.

THE COURT: I did charge this jury that as relates to all the charges, they may consider the Defendant's allegation that she was justified and that she had acted in self-defense. Your objection is noted.

MR. WILLIS: Thank you.

The same thing, of course, applies to the murder charge —the jury should consider all the evidence before attempting to reach their verdict in any particular charge. I again except as routinely to the fact—I say routinely, that I didn't refer, in my exception to the charge, that the statute unconstitutionally imposes the burden of proof on the Defendant to prove she's not guilty by reason of self-defense. That burden is placed on the Defendant. And to the extent that charge was submitted to the jury, I except to it. It's inappropriate in the context of the case.

Also, Judge, I want to note exceptions to certain segments of the Prosecutor's argument, which I think were inappropriate, giving her [714] opinion as to the numerous occasions that the Defendant was a liar. I don't think that's the prerogative of counsel for the State, to call anybody a liar. She talked about me using the word "liar," and characterized in the testimony, with regard to the State's witness. I did not use that word. I think that was inappropriate and I voiced my objection, which was overruled.

THE COURT: Some of which were sustained. But the Court at the time was satisfied that the Prosecutor in fact couched her arguments based upon the evidence.

MR. WILLIS: Thank you. My other objection is to the erroneousness of the statement. I think it is prejudicial and that's the reason why I did not make use of the statement made by Sadie, was intended to prove that what she said in the statement was consistent.

The other reason why I didn't cross examine her on the content of the statement, is because of what was stated in the statement was valid—something to that

effect. Erroneous. I didn't use the statement. The most prominent reason why I didn't use the statement, also, on cross-examination, was because the Court of Appeals [715] has ruled if you use even a piece of it, even the date, that makes the whole statement admissible. If you make any use of the prior written statement, the whole statement is in, as I understand from State versus Cirisullo and some of the other cases.

There are other contentions that if the statement would accurately reflect what the witness testified, would justify the non-use by Defense counsel. And I think that it is inappropriate, in light of that.

THE COURT: That particular portion of the argument, as I recall, was rebuttal to certain comments that you made on the cross-examination of various witnesses. Sir, you're aware of State versus Watson, where the Court of Appeals said the State would be remiss if it did not respond to that or—

MR. WILLIS: I remember that part of the argument. She incorporated the Court's direction to the witness as being a significant aspect of any assessment of her credibility. I think that in any instance whatever, the admonition the Court may give the witness should never be involved.

[716] THE COURT: The jury makes a decision based on what goes on in the four corners of this courtroom, as I remember. Also called upon to determine the credibility and to consider the candor and frankness or lack of it.

MR. WILLIS: I have no problem with that. Nothing further.

THE COURT: Anything on behalf of the State?

MISS GAUGHAN: Nothing further, your Honor.

[Certificate Omitted in Printing]

COURT OF APPEALS OF OHIO, EIGHTH DISTRICT
COUNTY OF CUYAHOGA

No. 48067

STATE OF OHIO, PLAINTIFF-APPELLEE

—VS—

EARLINE MARTIN, DEFENDANT-APPELLANT

JOURNAL ENTRY AND OPINION

Date of Announcement of Decision: Nov. 21, 1984

Character of Proceeding: Criminal appeal from Common Pleas Court, Case No. CR-184334

Judgment: Affirmed

Date of Journalization:

Appearances:

For Plaintiff-Appellee:

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For Defendant-Appellant:

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RUSSO, J.:

The defendant appeals her conviction for aggravated murder (R.C. § 2903.01) with a gun specification.

Early in the morning of July 21, 1983, Earline Martin and her husband, Walter Martin, argued over grocery money.

Earline Martin claims that her husband struck her in the head during the argument. After going upstairs to wash and put on a robe, she came back down with her husband's gun, which, she maintains, she was going to dispose of. Her husband saw that she had something in her hands and questioned her about it. She claims that he came at her, and she lost her head and fired the gun at him.

Five or six shots were fired, and three struck Walter Martin, killing him.

On appeal, Earline Martin assigns five errors:

Assignment of Error No. I:

"The prosecutor was guilty of misconduct by expressing her personal opinion that the accused was 'lying' (R 651) and was a 'liar' (R 652)."

The prosecutor's remarks were made in closing argument as she summarized the testimony of the defendant and other witnesses in the case.

The key consideration becomes whether the remarks naturally induced the jury to judge the case by considerations not presented in, or suggested by, the evidence. *State v. Carver* (1971), 30 Ohio App. 2d 115, 129.

State v. Price (1979), 60 Ohio St. 2d 136 at 140, permits closing remarks on the credibility of witnesses, especially when such remarks do not constitute an invitation to the jury to go beyond the evidence presented at trial. See also *State v. Rutherford*, No. 43182 (8th App. Dist. Ohio, Oct. 22, 1981), unreported.

Here, the prosecutor's remarks were a characterization of evidence presented to the jury; they did not rise to the status of prejudicial error.

Accordingly, Assignment of Error No. I is not well taken.

Assignment of Error No. II:

"The court erred in giving, and the appellant was greviously denied due process by virtue of, the various constitutionally defective instructions under which the aggravated murder and the lesser included homicide offenses were submitted to the jury."

Assignment of Error No. III:

"The appellant in this case was denied due process when the trial court instructed the jury not to even consider any lesser included offense unless they first found the accused not guilty of the greater offense."

In her second assignment, the appellant argues that the court charged the jury to agree unanimously that she be found not guilty of aggravated murder before considering a lesser charge.

This contention is simply not borne out by the record. It is not plausible to construe the court's charge [1] as requiring a unanimous verdict of not guilty of aggravated murder before considering the lesser included offense. See *State v. Hemann*, No. 45091 (8th App. Dist. Ohio, March 17, 1983), unreported.

In her third assignment, the appellant again focuses on the court's charge to consider the aggravated murder first before considering the lesser included offense. She construes this to mean that the jury must acquit unanimously of the greater offense before considering the lesser, in violation of the rule of *State v. Muscatello* (1977), 57 Ohio App. 2d 231. Again, the record does not

[1] "If you find beyond a reasonable doubt that the State of Ohio proved the elements of aggravated murder, you may not go on to consider any of the lesser included offenses defined for you. If you find the Defendant not guilty of aggravated murder, or if you are unable, after a good faith effort, to reach a verdict as to the crime charged, then and only then may you consider the lesser offense of murder. The same instruction is applicable should you go on to consider * * *.

support this construction. See *State v. Wilson*, No. 45650 (8th App. Dist. Ohio, June 23, 1983), unreported.

Assignments of Error Nos. II and III are not well taken.

Assignment of Error No. IV:

> "The court erred, and it was in violation of due process, when the jury was charged that to prevail on her plea of self defense [sic] the accused was required to, in effect, prove she was not guilty."

This court dealt with a nearly identical assignment of error in *State v. Moran*, No. 45879 (8th App. Dist. Ohio, Oct. 27, 1983), unreported. The issue has been raised several times before: *State v. Jones*, No. 44983 (8th App. Dist. Ohio, March 31, 1983), unreported; *State v. Henderson*, No. 43489 (8th App. Dist. Ohio, Dec. 17, 1981), unreported; *State v. Walker*, No. 40586 (8th App. Dist. Ohio, May 30, 1980), unreported.

Once again, we outline the law on this point. Revised Code § 2901.05 places the burden of proof for an affirmative defense on the defendant. The affirmative defense must be proved by a preponderance of the evidence.

By the rule in *State v. Poole* (1973), 33 Ohio St. 2d 18, self-defense is an affirmative defense. *State v. Robbins* (1979), 58 Ohio St. 2d 74, sets out the three elements a defendant must satisfy to prevail on this defense.

As *Moran*, and the cases cited with it, hold, such a self-defense charge by the court to the jury is not violative of the appellant's due process rights.

Assignment of Error No. IV is not well taken.

Assignment of Error No. V:

> "The guilty verdict in this case is against the manifest weight of the evidence and is contrary to law."

It is a well-accepted principle of Ohio law that the weight to be given to the evidence and the credibility of

the witness is the duty of the trier of facts. A reviewing court may not reverse a criminal conviction where the record shows that the verdict of guilty returned by the jury was based on sufficient evidence. *State v. DeHass* (1967), 10 Ohio St. 2d 230.

The record contains sufficient evidence for the trier of fact—the jury—to have reached its verdict of guilty of aggravated murder. We will not disturb that verdict.

Assignment of Error No. V is not well taken.

Judgment affirmed.

It is ordered that appellee recover of appellant its costs herein taxed.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Common Pleas Court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure. Exceptions.

Jackson, P.J., Concurs in Part
and Dissents in Part
(See Opinion attached)

Ann McManamon, J., Concurs

/s/ Basil M. Russo
BASIL M. RUSSO, Judge

(2)

N.B. This entry is made pursuant to the third sentence of Rule 22(D), Ohio Rules of Appellate Procedure. This is an announcement of decision (see Rule 26). Ten (10) days from the date hereof this document will be stamped to indicate * * *.

JACKSON, P.J., CONCURRING IN PART AND DISSENTING IN PART:

I concur with the majority disposition of appellant's first, second, third and fifth assigned errors. I disagree with their disposition of appellant's fourth assigned error. This assigned error charges error by the trial court in its instruction to the jury that defendant must assume the burden of proving that she acted in self-defense in the killing of her husband, Walter Martin.

My position on this issue has been stated in *State v. Tuncle* (Cuy. Cty. Ct. App., March 8, 1979), unreported Case No. 38424, *State v. Wealthy Johnson* (Cuy. Cty. Ct. App., May, 1981), unreported Case No. 42846, dissenting opinion, and innumerable other dissenting opinions. Simply stated I am persuaded that the State is required to prove every fact necessary to constitute the crime charged. *Mallaney v. Wilbur* (1975), 421 U.S. 684. This rule was subsequently declared to be retroactive * * *. In *Patterson v. New York* (1977), 432 U.S. 197, the Supreme Court emphasized that while that State must bear the burden on those affirmative defenses which do not serve to negate any facts of the crime, the State may, consistent with due process, place the burden on the accused to prove any issue *which does not negate an element of the crime*, but may only mitigate the degree of criminality or punishment. This interpretation was adopted by the Ohio Supreme Court. *See State v. Long* (1978), 53 Ohio St. 2d 91, 93 n.2; *State v. Frost* (1979), 57 Ohio St. 2d 121, 125-127. *See also United v. Jackson* (6th Cir. 1978), 587 F.2d 852, 854, and *State v. Tuncle*, *supra*, at 6.

The affirmative defense of self-defense is one of those defenses which serve to negate a fact necessary to constitute the crime. Self-defense negates the fact of unlawfulness. An act committed in self-defense *is not unlawful*; it is not a criminal act. Moreover, Article IV, Section 20 of the Ohio Constitution requires every indictment

to allege that the crime charged was against the "peace and dignity of the State of Ohio." Finally, the indictment by which defendant-appellant, in the case at bar, was charged, includes the allegation that she "unlawfully" killed her husband, Walter Martin.

My position is constitutionally supported because, if the State were to attempt to make an act of self-defense a crime, it would violate Article I, Sections 1 and 4 of the Ohio Constitution as well as the Second, Fourth, Ninth and Fourteenth Amendments to the United States Constitution. *See generally State v. Hardy* (1979), 60 Ohio App. 2d 325.

Historically, self-defense has been considered to negate the unlawfulness element. *E.g., State v. Silvus* (1871), 22 Ohio St. 90; *State v. Stout* (1892), 49 Ohio St. 270. The effect of this was recognized by this Court in *State v. Gideon* (1977), 52 Ohio App. 2d 70, 74, where this Court stated: ". . . if an act which would otherwise be criminal is done in self-defense, the self-defense will excuse the unlawfulness of the act."

I am cognizant of the fact that Ohio Revised Code § 2901.05 states that ". . . the burden of proof, by a preponderance of the evidence, for an affirmative defense, is upon the accused", and that the constitutionality of this requirement has been upheld by a decision from this Court. *State v. Davis* (1982), 8 Ohio App. 3d 205.

Nevertheless, I am convinced that Ohio Revised Code § 2901.05 is unconstitutional. I also note that *State v. Davis, supra*, made no mention of *State v. Tuncle, supra*, decided by this Court three years earlier, which held the statute to be unconstitutional. Until the United States Supreme Court or the Ohio Supreme Court specifically upholds the constitutionality of this statute, I shall adhere to my view that it is prejudicial error to place the burden of proof on an accused to establish by a preponderance of the evidence that he acted in self-defense. I respectfully dissent from the majority decision on this issue.

SUPREME COURT OF OHIO

THE STATE OF OHIO, APPELLEE

v.

MARTIN, APPELLANT

[Cite as State *v.* Martin (1986), 21 Ohio St. 3d 91.]

Criminal law—State may require defendant to prove affirmative defense of self-defense.

O.Jur. 3d Criminal Law § 1134.

R.C. 2901.05 requires the prosecution to prove beyond a reasonable doubt every element of a homicide offense as defined by statute, and does not require the defendant to disprove an essential element of this offense. The state may constitutionally require a defendant to prove, by a preponderance of the evidence, the affirmative defense of self-defense.

(No. 85-114—Decided January 15, 1986)

Appeal from the Court of Appeals for Cuyahoga County

OPINION

On the morning of July 21, 1983, appellant, Earline Martin, shot to death her husband, sixty-eight-year-old Walter C. Martin, Sr., after an argument over grocery money. Appellant was arrested and charged with aggravated murder pursuant to R.C. 2903.01.

Appellant pleaded not guilty and, at trial, raised the affirmative defense of self-defense. Appellant took the stand and testified she feared for her life because the victim struck her just prior to the fatal shooting. In closing argument, the prosecutor characterized appellant's testimony as a sham, amounting to a lie.

Appellant requested and received jury instructions on self-defense. At the close of evidence and argument, the

trial judge instructed the jury on the offense of aggravated murder and the lesser-included offenses of murder and voluntary manslaughter. The trial court instructed the jury that it should not consider any lesser-included offense if the jury first found that the state had proved beyond a reasonable doubt all of the elements of the offense of aggravated murder. The trial court's charge included the following:

"Basically speaking, look at the aggravated murder first. If you find the Defendant not guilty, then you go to murder. In the event that you deliberate as to murder, and making a good faith effort, you are unable to reach a verdict, then you go to the next step, the same thing, going on to voluntary manslaughter."

The jury found appellant guilty of aggravated murder with a gun specification, and the court sentenced her to life and a three-year term of imprisonment. On appeal, appellant claimed five assignments of error. First, appellant contended that the state unconstitutionally imposed upon her the burden of proving self-defense and that this, in effect, required her to prove her innocence. Second and third, appellant claimed she was denied due process of law when the trial court instructed the jury not to consider the lesser-included offenses unless and until it had reached a conclusion regarding the aggravated murder offense. Appellant further claimed that the verdict of guilty was against the manifest weight of the evidence. Finally, appellant claimed substantial prejudicial error in the prosecutor's closing remarks.

The court of appeals found these assignments of error not well-taken and affirmed appellant's conviction.

The cause is now before this court pursuant to the allowance of a motion for leave to appeal.

John T. Corrigan, prosecuting attorney, and *Patricia A. Gaughan*, for appellee.

James R. Willis, for appellant.

CELEBREZZE, C.J.

I

Our first consideration concerns appellant's contention that the state of Ohio may not constitutionally place the burden of proving self-defense on a defendant if the truth of that defense would negate an essential element of the crime charged. Appellant asserts that self-defense negates the *mens rea* of aggravated murder and that requiring a defendant to prove self-defense thus compels the defendant to prove his innocence by disproving criminal intent. Since it is constitutionally impermissible to require an accused to prove his innocence, appellant contends that once a defendant produces evidence of self-defense, the prosecution must then disprove self-defense beyond a reasonable doubt.

We find no merit in this contention. R.C. 2901.05(A) clearly states that the burden of proving all elements of the offense charged including *mens rea*, beyond a reasonable doubt, is on the prosecution. This section also places the burden of proving an affirmative defense, by a preponderance of the evidence, on the accused. R.C. 2901.05 (C)(2) defines an affirmative defense as "[a] defense involving an excuse or justification peculiarly within the knowledge of the accused, on which he can fairly be required to adduce supporting evidence." This court has long determined that self-defense is an affirmative defense. See *State* v. *Nolton* (1969), 19 Ohio St. 2d 133 [48 O.O.2d 119].

In the case *sub judice*, appellant was charged with the offense of aggravated murder. Thus, the state was required to prove beyond a reasonable doubt the elements of that crime, defined by R.C. 2903.01 as purposely, and with prior calculation and design, causing the death of another. Certainly no less can be required of the state because "* * * the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." *In re Winship* (1970),

397 U.S. 358, 364 [51 O.O.2d 323]. Appellant contends, however, that the Constitution requires more. Not only must the state prove the elements of the crime charged, appellant asserts, it must also disprove self-defense. We are unable to find support for this contention.

In *Patterson* v. *New York* (1977), 432 U.S. 197, the United States Supreme Court addressed a question very similar to that in the case *sub judice*. At issue was the constitutionality of a New York statute which placed upon the defendant the burden of proving the affirmative defense of extreme emotional distress. The *Patterson* court held that, consistent with due process, the prosecution was required to prove beyond a reasonable doubt only those elements included in the statutory definition of the offense charged. The recognition of an affirmative defense, the court stated, did not require the state to prove its nonexistence:

"We thus decline to adopt as a constitutional imperative, * * * that a State must disprove beyond a reasonable doubt every fact constituting any and all affirmative defenses related to the culpability of an accused." *Patterson*, *supra*, at 210.

The Supreme Court also recognized in *Patterson* that the obligation to disprove the existence of self-defense is a burden which the state, in its judgment, may properly deem too onerous to undertake in view of the fact that an affirmative defense is one involving facts peculiarly within the knowledge of the defendant, which he, not the state, may fairly be required to prove. This is exactly the view contained in R.C. 2901.05(C)(2).

The *Patterson* court also noted that there are affirmative defenses which do not seek to negate any of the elements of the offense which the state is required to prove. *Id.* at 206-207. This is the nature of self-defense under Ohio law. This court, in *State* v. *Poole* (1973), 33 Ohio St. 2d 18, 19 [62 O.O.2d 340], characterized the defense of self-defense as a "justification for admitted conduct." Self-defense represents more than a "denial or contradic-

tion of evidence which the prosecution has offered as proof of an essential element of the crime charged * * *." *Id.* Rather, we stated in *Poole*, this defense admits the facts claimed by the prosecution and then relies on independent facts or circumstances which the defendant claims exempt him from liability. *Id.* Thus, the burden of proving self-defense by a preponderance of the evidence does not require the defendant to prove his innocence by disproving an element of the offense with which he is charged. The elements of the crime and the existence of self-defense are separate issues. Self-defense seeks to relieve the defendant from culpability rather than to negate an element of the offense charged. In the case *sub judice*, the state proved beyond a reasonable doubt that appellant purposely, and with prior calculation and design, caused the death of her husband. Appellant did not dispute the existence of these elements, but rather sought to justify her actions on grounds she acted in self-defense.

We therefore hold that R.C. 2901.05 requires the prosecution to prove beyond a reasonable doubt every element of a homicide offense as defined by statute, and does not require the defendant to disprove any essential element of this offense. Thus, the state may constitutionally require a defendant to prove, by a preponderance of the evidence, the affirmative defense of self-defense. Accord *State* v. *Moran* (Oct. 27, 1983), Cuyahoga App. No. 45879, unreported, certiorari denied *Moran* v. *Ohio* (1984), —— U.S. ——, 83 L. Ed. 2d 285.

Accordingly, the judgment of the court of appeals is affirmed on this issue.

II

Appellant next contends that she was denied due process of law when the trial judge instructed the jury not to consider the lesser-included offenses until it made a determination regarding the offense of aggravated murder. Although appellant argues that these instructions had the effect of preventing the jury from considering the

lesser-included offenses, we are not persuaded that this was the case.

This argument was previously rejected in *State* v. *Muscatello* (1977), 57 Ohio App. 2d 231 [11 O.O.3d 320], affirmed (1978), 55 Ohio St.2d 201 [9 O.O.3d 148], where we stated that a similar charge on voluntary manslaughter and its lesser-included offenses was not prejudicially erroneous. When the jury has before it all the evidence and instructions for each offense, it is realistic to assume that the jury will not consider each offense in isolation from the others. If, as in the case *sub judice*, the jury unanimously determines that defendant is guilty of the highest degree of the offense, it can be assumed that the jury has also considered and rejected evidence regarding self-defense and the lesser-included offenses.

Accordingly, this argument is without merit.

III

Appellant also challenges the jury's verdict as against the manifest weight of the evidence.

The standard for our review is whether, after viewing the evidence in a light most favorable to the prosecution, a reasonable jury could have found the essential elements of the crime beyond a reasonable doubt. *Jackson* v. *Virginia* (1979), 443 U.S. 307. Further, we must bear in mind that the weight given to evidence and judgment of the credibility of witnesses are in the province of the jury. A reviewing court may not reverse a judgment of conviction where the record shows a verdict based on sufficient evidence. *State* v. *DeHass* (1967), 10 Ohio St. 2d 230 [39 O.O.2d 366], paragraph two of the syllabus.

After a thorough review of the record, we are convinced that there was sufficient evidence from which the jury could find, beyond a reasonable doubt, that the elements of the crime of aggravated murder were proven beyond a reasonable doubt.

Several prosecution witnesses testified as to explicit threats made against the victim by appellant. Physical

and scientific evidence showed that appellant deliberately shot the victim several times at close range. The victim's attorney testified that the victim was visibly weakened after May 1983. According to a friend of the victim's daughter, this was the result of a heart attack and stroke which the victim suffered two months prior to the killing. Based on this evidence, the jury rejected appellant's claim of self-defense and found her guilty of aggravated murder.

Accordingly, we conclude that there is ample evidence in the record to support the jury's verdict. Consequently, appellant's contention is without merit.

IV

Appellant lastly contends that the prosecutor's remarks in closing argument, characterizing appellant's testimony as a fabrication, were substantial prejudicial error requiring reversal.

We begin our discussion by observing that it is improper for a prosecutor to express his or her personal opinion concerning the credibility of a witness.[1] We have also held, however, that "* * * the conduct of a prosecuting attorney during trial cannot be made a ground of error unless that conduct deprives the defendant of a fair trial." *State* v. *Maurer* (1984), 15 Ohio St. 3d. 239, 266.

This court recently considered a case involving prosecutorial misconduct in *State* v. *Smith* (1984), 14 Ohio St. 3d 13. There, we held that "* * * it must be clear beyond a reasonable doubt that, absent the prosecutor's

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[1] DR 7-106(C) provides in part:

"In appearing in his professional capacity before a tribunal, a lawyer shall not:

"* * *

"(4) Assert his personal opinion as to the justness of a cause, as to the credibility of a witness, as to the culpability of a civil litigant, or as to the guilt or innocence of an accused; but he may argue, on his analysis of the evidence, for any position or conclusion with respect to the matters stated herein."

comments, the jury would have found [the] defendant guilty." *Id.* at 15.

Therefore, we must focus upon whether, aside from the prosecutor's remarks, the jury would have convicted appellant of the offense of aggravated murder. We have previously stated that the record reveals substantial evidence supporting the jury's verdict. We are convinced, beyond a reasonable doubt, that even absent the prosecutor's statements, the jury would have found appellant guilty.

Accordingly, we do not find reversible error in these remarks and affirm the judgment of the court of appeals.

Judgment affirmed.

LOCHER, HOLMES, DOUGLAS and WRIGHT, JJ., concur.

SWEENEY and C. BROWN, JJ., dissent.

SWEENEY, J., dissenting. Because I believe that R.C. 2901.05 unconstitutionally shifts the burden of proof of self-defense to the accused, I must respectfully dissent from Part I of the majority decision.

As was pointed out by Judge Jackson in the appellate court below, the affirmative defense of self-defense is one which serves to negate a fact that is necessary to constitute the crime charged. The "facts" that self-defense serves to negate are voluntariness and unlawfulness.

I believe it is clear that an act committed in self-defense is not unlawful in any event. Self-defense is not a crime; rather, it is an act of justification. The majority opinion fails to recognize the crucial difference between an affirmative defense of mitigation, such as that found in *Patterson* v. *New York* (1977), 432 U.S. 197, and an affirmative defense of justification, which is the essential nature of self-defense.

In *Patterson*, the affirmative defense of "extreme emotional disturbance" gave the accused the opportunity to show that his act of murder was, in reality, one of manslaughter. The affirmative defense of self-defense al-

leged herein, however, goes to the *mens rea* of the crime charged, *i.e.*, whether the act committed was indeed a criminal act. While *Patterson* involved a matter of the degree of the crime, the instant case involved the matter of whether the act committed was a crime *ab initio*.

While I do not quibble with the United States Supreme Court's analysis and decision in *Patterson* with respect to the affirmative defense it had before it, I do wish to re-emphasize that the legal efficacy of the *Patterson* decision with respect to the affirmative defense of self-defense was recently questioned in the case of *Engle* v. *Isaac* (1982), 456 U.S. 107, as is pointed out in Justice Clifford Brown's well-reasoned dissent.

Other jurisdictions have grappled with the issue of due process in this context, and there appears to be a distinct split of authority with regard to this issue. *Id.* at 122, fns. 23 and 24. Hopefully, the high court will resolve this judicial dilemma by granting *certiorari* in the cause *sub judice*.

In my view, R.C. 2901.05 amounts to an unconstitutional deprivation of due process in violation of the Fourteenth Amendment of the United States Constitution, and Section 16, Article I of the Ohio Constitution. This statute, along with the majority opinion herein, places the burden of persuasion on the accused that he or she committed an entirely lawful act—taking the life of another in self-defense. In this manner, the court has relaxed the standard that the state must prove every element of the crime charged beyond a reasonable doubt.

For these reasons, I would reverse the judgment of the court of appeals.

C. BROWN, J., concurs in the forgoing opinion.

CLIFFORD F. BROWN, J., dissenting. I must respectfully dissent from the majority's affirmance of the judgment of the court of appeals in this case.

I agree with the partial dissent below that R.C. 2901.05 is unconstitutional insofar as it places the burden of prov-

ing self-defense by a preponderance of the evidence on the accused. For more than a century, self-defense has been considered to negate the element of unlawfulness which must be present in order to convict a defendant of aggravated murder. See *Silvus* v. *State* (1871), 22 Ohio St. 90. Thus, R.C. 2901.05 permits the state to convict a defendant without proving every element of the crime charged, contrary to the principles of *Patterson* v. *New York* (1977), 432 U.S. 197.

I note that in the case of *Engle* v. *Isaac* (1982), 456 U.S. 107, 121-123, the Supreme Court of the United States, in *dictum*, interpreting Ohio law, recognized that the placement on the accused of the burden of proof of affirmative defenses such as self-defense raised a "colorable constitutional claim." There, the issue remained unresolved as not properly before the court. When the issue is properly before the court, I believe my position will be vindicated. Based on the foregoing, I would hold that R.C. 2901.05 impermissibly lessens the state's burden of proof and is thus unconstitutional as to the affirmative defense of self-defense.

Accordingly, I would reverse the judgment of the court of appeals.

SUPREME COURT OF THE UNITED STATES

No. 85-6461

EARLINE MARTIN, PETITIONER

v.

OHIO

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OHIO

ON CONSIDERATION of the motion for leave to proceed herein *in forma pauperis* and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed *in forma pauperis* be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted, limited to Question IV presented by the petition.

April 21, 1986